

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

DATE: April 29, 2019 TIME:
JUDGE: Monica L. Stauffer CLERK: Amy Hunley
BY: Cristina R. O'Coyne (Greenlee County)

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| Case No. CV201900060 | Counsel of Record: |
| DAVID WELCH, individually and on behalf of ALL CITIZENS OF COCHISE COUNTY PRECINCT FIVE, | D. Christopher Russell Attorney for Petitioner |
| Petitioner, | Robert D. Stachel, Jr. Attorney for Petitioner |
| v. | Jana Flagler Attorney for Petitioner |
| COCHISE COUNTY BOARD OF SUPERVISORS, PATRICK G. CALL, ANN ENGLISH, AND PEGGY JUDD, | Jim Jellison Attorney for Respondents |
| Respondents. | |

UNDER ADVISEMENT

On March 4, 2019, petitioner filed a *First Amended Special Action and Petition for Writ of Mandamus, Petition for Injunctive and Declaratory Relief, Petition for Removal of Board of Supervisors from Office*.

On March 22, 2019, Respondents filed a *Motion to Dismiss Re: Lack of Standing and Failure to State a Claim*. Petitioners filed a Response and Respondent thereafter filed a Reply. Subsequently, Petitioner filed a *Motion to Compel Production of Confidential Executive Session Minutes, Audio and Other Records*. Respondent filed an Opposition to the motion.

COURT FINDINGS & ORDERS

To properly address the requirements of Standing, the court must review the standards under each form of relief sought by Plaintiff in this action.

1. Count I Declaratory Action and Count III Injunctive Relief.

Petitioner has failed to establish standing in his Amended Petition under Declaratory Action or Injunctive Relief. Petitioner has failed to identify a protectible interest other than stating he is a citizen of the county and a resident of the precinct involved and therefore, as such he has been denied those protectible interests and rights.

Petitioner further asserts standing to bring claims for declaratory or injunctive relief in conjunction with his mandamus claims. The Court disagrees that bringing various actions before the court allows standing to be granted in a "catch all" manner. This court finds that Petitioner must demonstrate Standing in each separate form of relief. *Crouch v City of Tucson*, 145 Ariz. 65, 699 P.2d 1296 (App. 1984). Otherwise, the establishment of standing as to **any** type of action could be "tied" to an action in Mandamus and thereby attempt to confer standing where a party otherwise would not have met the legal requirements.

To establish standing under Count I and/or Count III, Petitioner must demonstrate a distinct and palpable injury or particularized harm. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 108 P.3d 917 (2005). *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs in Ariz.*, 148 Ariz. 1, 712 P.2d 914 (1985); *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 153 P.3d 374 (App. 2007). In the Amended Special Action, Petitioner makes no attempt to show distinct, palpable injury or particularized harm. Petitioner's Justice of the Peace Court matter has been dismissed. Even had his case not been dismissed, Petitioner alleges no harm or injury. Petitioner must have suffered an "injury in fact, economic or otherwise." *Aegis of Arizona v. Town of Marana*, 206 Ariz. 557, 562, 81 P.3d 1016, 1021 (App. 2004) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970)). Further, injury that is only remotely possible or based on sheer speculation does not give rise to relief. *Klein v. Ronstadt*, 149 Ariz. 123, 716 P.2d 1060 (App.1984). Disagreeing with the appointment or form of appointment does not reach the level of establishing a particularized harm or distinct injury to confer standing to bring a Declaratory Action or Injunctive Relief.

Further, without a showing of a particularized harm or distinct injury, bringing an action under the status as a taxpaying citizen does not confer standing to bring an action for Declaratory Action or Injunctive Relief. *Tucson Community Development and Design Tucson Community Development and Design Ctr., Inc. v. City of Tucson*, 131 Ariz. 454, 641 P.2d 1298 (App. Div. 2, 1982). The county's expenditure of the tax monies on Justice of the Peace #5 would be spent regardless of the person appointed.

Finally, because the Court has found that Petitioner personally lacks standing, he also fails to establish a distinct and palpable injury or particularized harm on behalf of **all** citizens of Cochise County, Precinct 5.

2. Count II Writ of Mandamus.

A.R.S. §12-2021 allows for a mandamus action upon a verified complaint of the party beneficially interested to compel performance of an act which the law imposes as a duty. *Armer v. Superior Court of Arizona, In & For Pima Cty.*, 112 Ariz. 478, 543 P.2d 1107 (1975).

A Writ of Mandamus is the proper procedure for relief when the actions sought to be compelled are ministerial. *Crouch v. City of Tucson*, 145 Ariz. 65, 699 P.2d 1296 (Div. 2, 1984).

The Court finds that Petitioner has established standing to bring an action under mandamus. However, under the specific requirements for standing to bring a Writ of Mandamus action against a County Board of Supervisors, more than a beneficial interest is required.

A.R.S. §38-431.07 (A) and A.R.S. §38-506(B) require actions brought against the Board of Supervisors for open meeting law violations or violations as to conflict of interest to be a person affected by their action or decision. Case law is not helpful in determining this standard. While the parties agree that “person affected” standard is different from “beneficially interested”, there is no Arizona case defining such a standard. However, Petitioner fails to even adequately assert how he is a “person affected” under A.R.S. §38-431.07(A) and A.R.S. §38-506(B). The Court therefore finds that Petitioner lacks Standing under Count II. However, the Court has conducted an analysis below should the Court have incorrectly denied Standing under this claim of action. (See discussion under Failure to State a Claim Upon Which Relief May Be Granted).

3. Count IV Removal from Office

The action of seeking removal of a person holding public office is an action in *quo warranto*. *Quo warranto* is the exclusive remedy for challenging a public office holder. *Jennings v. West*, 194 Ariz. 314, 982 P.2d 274 (1999); *Crouch v. City of Tucson*, 145 Ariz. 65, 699 P.2d 1296 (App. 1984).

“Where a party . . . asserts a general interest, his challenge must be through a complaint to the attorney general or county attorney that the franchise is held illegally. In such instance, the attorney general or county attorney . . . shall bring the action [in *quo warranto*] when he has reason to believe that any such office or franchise is being . . . unlawfully. . . exercised.” See *Crouch* at 67, see also *Rural Metro Fire Dep’t, Inc. v Pima Cty.*, 122 Ariz. 554, 556, 596 P.2d 389, 391 (App. 1979).

Under A.R.S. §12-2041 et. seq., an action testing the qualifications and removal of an official can be maintained only by the attorney general; the county attorney; or a person claiming a present entitlement to the office who has first sought attorney general or county attorney action. A challenge to the qualifications and removal of a public official from office cannot be brought by any other class of plaintiff or petitioner. See *Jennings*. Petitioner has not asserted or alleged that he is entitled to the office of Justice of the Peace #5. Therefore, Petitioner has no standing to pursue this form of relief under his Amended Petition.

Failure to State a Claim Upon Which Relief May Be Granted

As set forth above, the Court has found that Petitioner lacks standing under each form of action alleged.

For clarity, even if the Court had found that Standing exists under Petitioner’s Writ of Mandamus, the Petitioner has failed to State Claims upon Which Relief May be Granted.

The Court will address each of Petitioner’s claims under Count II Writ of Mandamus individually as follows:

“102. That this Court issue a Writ of Mandamus immediately removing each of the Respondents from their public office on the Board of Supervisors pursuant to A.R.S. 38-431.07.”

Petitioner is seeking immediate removal of office of each of the three Board of Supervisor members. While the request is under the heading of Writ of Mandamus, this is not a petition for a Writ of Mandamus action. It is a Petition for *Quo Warranto* relief for which Petitioner lacks standing and therefore Fails to State a Claim upon which Relief May Be Granted

in Petitioner's Amended Petition.

"103. The Court declare the appointment of Pat Call to position of JP5 Judge as null and void and to issue a Writ of Mandamus requiring Respondents to comply with the open meeting statutes and properly notify the public of its intent to appoint one of its own members to fill the vacancy of Justice of the Peace and to open the position to the public for application (bidding) by other qualified candidates."

Where the provision of public meetings and proceedings are not complied with, a court of competent jurisdiction may issue a writ of mandamus requiring that a meeting be open to the public. A.R.S. §38-431.04.

The Court finds the Board of Supervisors cured any issue of open meeting laws improprieties at the March 14, 2019 ratification meeting.

There are situations where mandamus may be used to compel a public officer, board...to take action even though such action is discretionary, but it cannot be used to require that such discretion be exercised in a particular manner. *Sensing v. Harris*, 217 Ariz. 261, 172 P.3d 856 (App. 2007).

The Court finds that the appointment of Supervisor Call does not fall within the plain language of the conflict of statutes. A.R.S. §11-251(16) places a statutory duty on a County Board of Supervisors to fill county or precinct offices by appointment. A.R.S. §16-230 (A)(2) governs the process to fill a vacancy in Justice of the Peace Office. Pat Call was qualified under the requirements to serve as a Justice of the Peace. The conflict of interest statutes relied upon by Petitioner are not applicable to the facts in this case.

The Board of Supervisors have discretion as to how they choose to fill a vacancy in the Justice of the Peace Office as long as the candidate is qualified. Mandamus does not lie if a public officer is not specifically required by law to perform the act in question. *Sensing v. Harris*, 217 Ariz. 261, 172 P.3d 856 (App. 2007). A.R.S. §16-230(A)(2) does not require the Board of Supervisors to open the position to the public for application by other qualified and interested candidates.

Therefore, Petitioner has Failed to State a Claim upon which Relief May be Granted.

"104. That the Court should issue a Writ of Mandamus requiring the BOS to convene a proper judicial selection committee to assist in selecting the candidate given their demonstrated malfeasance of their duties in accordance with law."

The law does not require a Board of Supervisors to convene a proper judicial selection committee to assist in selecting a candidate for a vacancy in the Justice of the Peace Office. Mandamus does not lie if a public officer is not specifically required by law to perform the action in question. See *Sensing*. A Writ of Mandamus cannot be used to require that a discretionary act be exercised in a particular manner. See *Sensing*.

The Petitioner has Failed to State a Claim Upon which Relief May be Granted as to this allegation.

"105. That the Court should also issue a Writ of Mandamus ordering the BOS to

immediately produce the minutes of the executive session for in camera review by the Court for consideration of release to the public as being relevant to this action pursuant to A.R.S. §38-431.07(c).”

Because of the Court’s ultimate decision in this matter, the relief sought is no longer relevant to this action. The request and subsequent motion by Petitioner to make such an order is moot and therefore denied.

“106. That this Court issue a Writ of Mandamus ordering Pat Call to pay back to Cochise County any salary he has received for services rendered as JP5 Judge.”

As cited above, the Court has found that the appointment of Pat Call was properly made at the meeting on March 14, 2019 ratifying the appointment and it was within the legal discretion of the Board of Supervisors as to his appointment under A.R.S. 16-230(A)(2). Because the Court finds that Pat Call was legally appointed to the position of Justice of the Peace, an action in Mandamus to order Pat Call to pay back to Cochise County any salary he has received is inapplicable and therefore Petitioner has Failed to State a Claim Upon Which Relief May be Granted.

“107. That this Court issue a Writ of Mandamus ordering BOS vis-à-vis the county to stop paying the legal fees for the Respondents related to this lawsuit and any other legal action arising from their violation of the open meeting laws and conflict-of-interest laws in appointing Pat Call to JP5.”

See discussion under # 102 – 106 above. Because the Court has found that the Respondents have not violated the open meeting laws nor the conflict-of-interest laws in appointing Pat Call to Justice of the Peace #5, a Writ of Mandamus does not lie. The Petitioner has Failed to State a Claim Upon Which Relief May be Granted.

For the above reasons and findings, IT IS THE ORDER OF THE COURT dismissing Petitioner’s Amended Special Action with prejudice. IT IS FURTHER ORDERED vacating the trial set for May 2-3, 2019. Based upon the dismissal by this Court, Petitioner’s Motion to Compel is moot/denied.

Dated this 29th day of April 2019.


Monica L. Stauffer, Superior Court Judge

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